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Supreme Court, U.S.
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No. 15-6418

IN THE
Supreme Court of the United States

GREGORY WELCH,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The
United States Court Of Appeals
For The Eleventh Circuit

SUPPLEMENTAL BRIEF FOR PETITIONER

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SUPPLEMENTAL BRIEF OF PETITIONER

Pursuant to this Court's Rule 15.8, Petitioner submits this supplemental brief regarding the government's December 22, 2015 response in *Harrimon v. United States*, No. 15-7426.

In response to Petitioner's petition for a writ of certiorari, the government represented that this case would not be an appropriate vehicle to resolve the circuit split regarding whether *Johnson v. United States*, 135 S. Ct. 2551 (2015), has been "made retroactive" to second or successive § 2255 motions "because petitioner seeks review of the denial of his first Section 2255 motion." Mem. of United States 3. In its recent response in *Harrimon*, however, the government has taken the opposite position, representing that review of a first § 2255 motion "would afford an opportunity to resolve the conflict over whether *Johnson* is a substantive rule that is retroactive to cases on collateral review," the resolution of which "would expressly 'ma[k]e' *Johnson* retroactive and permit prisoners filing timely second or successive motions to satisfy the gatekeeping requirements of 28 U.S.C. 2255(h)(2)." Br. of United States at 23, *Harrimon v. United States*, No. 15-7426 (U.S. Dec. 22, 2015). The government further suggests that the Court may wish to grant certiorari *prejudgment* in *Harrimon*. *Id.* at 31

To the extent that this Court accepts the government's newfound position that this Court should grant plenary review of *Johnson*'s applicability to an initial

§ 2255 motion, it would make little sense to do so *prejudgment*—which raises complex procedural hurdles under this Court's Rule 11, *see* Br. of United States at 23-28, *Harrimon v. United States*, No. 15-7426 (U.S. Dec. 22, 2015)—when Petitioner's case presents an opportunity to review the retroactivity of *Johnson* to initial § 2255 motions without such procedural hurdles. Here, the Eleventh Circuit has issued a judgment on Petitioner's request for a certificate of applicability, and there is no dispute that Petitioner was sentenced pursuant to the now-void residual clause of ACCA. Pet. Reply 3-4; Mem. of United States 1-2. Moreover, Petitioner raised the retroactivity of *Johnson* at every opportunity, including requesting a stay pending *Johnson* and requesting leave to seek reconsideration in light of *Johnson*. Pet. Reply 3-4. Petitioner is now entitled to the benefit of *Johnson* pursuant to the simple fact that *Johnson* was decided after the court of appeal's decision and before resolution of his initial § 2255 has become final.

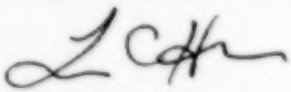
The government's recognition that this Court could use its discretionary certiorari power to GVR this case is itself an acknowledgment that the Court could—if it chooses to review the applicability of *Johnson* to an initial § 2255 motion—use its discretionary certiorari power to grant plenary review in this case. *See Lawrence v. Chater*, 516 U.S. 163, 167 (1996) (explaining that GVR is simply a means of "conserv[ing] the scarce resources of this Court that might otherwise be expended on plenary consideration"). Granting plenary review of *Harrimon* would

lead to the bizarre circumstance in which Petitioner's case—which presents an unobstructed opportunity to review the applicability of *Johnson* to an initial § 2255 motion—is held (by this Court or, upon GVR, by the Eleventh Circuit) pending a prejudgment case that presents needless procedural complexities.

CONCLUSION

As Petitioner stated in his Reply Brief, the Court should resolve the conflict over whether *Johnson* has been "made retroactive" to successive petitions using one of the successive petitions pending before this Court and immediately GVR this case for further consideration in light of *Johnson*. In the alternative, should the Court wish to resolve the conflict over *Johnson* by granting a petition for certiorari in a case involving an initial petition, the Court should grant plenary review of this case.

Respectfully submitted,



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